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No. 99-

IN THE

Supreme Court of the United States

GREGORY ACCARDI and HOLLY ACCARDI,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. A. Whether, in a civil forfeiture action, the remedy imposed against the government for its illegal seizure of real property can be limited to "lost income" when the property itself is used exclusively for residential purposes and has no commercial use?

B. Whether an inter-circuit conflict exists as to whether the remedy for unconstitutional seizure of real property in a civil forfeiture proceeding is restricted to lost income — "rents and profits"?

II. If a damage remedy is appropriate in *Good* violation cases, should that remedy include provable non-economic losses?

III. Does the decision by the Seventh Circuit Court of Appeals on the issue of a bifurcated hearing involving Eighth Amendment violations in civil forfeiture cases conflict with the decision of the Third Circuit Court of Appeals?

IV. Does the decision by the Seventh Circuit Court of Appeals on the issue of a bifurcated hearing involving Eighth Amendment violations deny the constitutional safeguards accorded a property owner pursuant to *United States v. Bajakajian*?

PARTIES TO THE PROCEEDING

The only parties to the proceeding in the Seventh Circuit Court of Appeals which is being appealed are those listed in the caption of this Petition for Writ of Certiorari.

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Petitioners, Gregory Accardi and Holly Accardi, respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 190 F.3d 781. (Appendix A). The opinion of the United States Court of Appeals for the Seventh Circuit regarding the Petition for Rehearing is not published. (Appendix C).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit (Court of Appeals) was entered on August 19, 1999. The Court of Appeals denied a timely petition for rehearing on November 2, 1999.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

The Eighth Amendment to the United States Constitution provides in relevant part: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted".

21 U.S.C. § 881(a)(7)

Forfeitures

(a) Subject Property

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this sub-chapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reasons of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

STATEMENT OF THE CASE

This case started when the United States government sought the civil forfeiture of the petitioners' family farm and *ex parte* seizure of the land pending final adjudication. The action was filed approximately one year before this Court's decision in *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993) (hereinafter referred to as *Good*) and continued until May 1997 when the district court granted forfeiture. Ultimately, the court ruled that innocent

co-owners (Steve and Susan Stout) held one-half interest in the property, and Petitioners whom the court ruled were both culpable should forfeit their one-half interest.

As described more fully below, the United States Government held the Petitioners' farm throughout the litigation based upon an *ex parte* seizure warrant. Following the *Good* decision, which guaranteed real property owners protection from unwarranted *ex parte* seizures, the Government held Petitioners' farm for approximately three and one-half years without giving Petitioners any form of due process hearing and without showing any exigent circumstances that might justify its pre-hearing seizure of the property.

Petitioners derived no income from the farm. It was not used for commercial farming, nor was it rented to anyone for commercial purposes. On May 7, 1996 the district court, conceding the Government's constitutional violation of Petitioners' Due Process rights, held the Petitioners' remedy was limited to the lost rents or profits for the period in which the government illegally held the property. Petitioners contend such a remedy is meaningless, particularly when applied to non-incoming producing real property, such as their farm. Further, the Petitioners assert a clear division of authority exists among several circuit courts of appeals on this question. As stated below, though in conflict with several other circuits, the Eighth Circuit Court of Appeals in *United States v. One Parcel of Real Property, Located at 9638 Chicago Heights, St. Louis, Missouri*, 27 F.2d 327 (8th Cir. 1994) adopted a remedy which ensures compliance in all instances with the owners' due process rights and protects every legitimate interest the government can advance.

In December 1992, the United States filed a verified complaint alleging that Gregory and Holly Accardi used the farm which they co-owned as joint tenants with Steve and Susan Stout to grow marijuana. Hence, the United States claimed the farm was forfeitable pursuant to 21 U.S.C. § 881(a)(7). When it filed this forfeiture complaint, the United States also filed a "*lis pendens*" notice on the farm property. Shortly thereafter, the district court concluded after an *ex parte* hearing that probable cause existed for a search and seizure of the property. The United States then searched and seized the property. Subsequently, the State of Illinois dismissed all criminal drug charges against the Accardis. The United States, however, thereafter continued forfeiture proceedings against the property itself.

Approximately one year after the seizure just described occurred, the Court held in *United States v. James Daniel Good Real Property, et al.*, 510 U.S. 43, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993), absent exigent circumstances, *ex parte* seizures of real property such as those that occurred in the present case violated the Due Process Clause of the Constitution. The effect of *Good* — an effect not disputed here — is the seizure in the present case was unconstitutional. Despite the fact that the seizure here was demonstrated in 1993 to be unconstitutional, the United States itself failed for at least three and a half years to take any action to "cure" its own unconstitutional actions. Rather, the United States simply waited for the civil forfeiture action to run its course.

On May 6, 1996, the Accardi's filed a motion to dismiss based on the *Good* case. The district court, on May 7, 1996, ruled that it would not dismiss the forfeiture action. Rather, the district court ruled that the only remedy available to the Accardis would be identified financial losses incurred as a

result of the wrongful seizure. Further, the district court held the only injury would be the payment of expenses that would not have been borne if the building had remained occupied by the claimants. This May 7, 1996 ruling was essentially the District Court's last substantive ruling on the *Good* issue.

In May 13, 1997, the district court ruled that the forfeiture itself was proper. It further found the co-owners, Steve and Susan Stout, were innocent owners and directed they receive 50% of the sale proceeds. While doing this, however, the court also recognized the possible existence of a "proportionality" issue in the case, a proportionality issue the United States itself had mentioned in a earlier filed pleading. Notwithstanding the possible existence of this proportionality issue, the district court ruled that the Accardis' failure affirmatively to raise this issue prevented the Court from addressing it. Immediately after the district court's ruling, the Accardis affirmatively raised the proportionality issue. The district court then ruled that the Accardis' proportionality pleading was untimely filed.

On appeal, the Seventh Circuit — relying on its own earlier post-*Good* case, *United States v. All Assets and Equipment of West Side Building Corp., et al.*, 58 F.3d 1181 (7th Cir. 1995), *affirmed the District Court's various rulings*, 190 F.3d 781 (7th Cir. 1999). The remedy in *Good* violation cases, the Seventh Circuit ruled, is that the "government is responsible 'for the profits of which the claimant was deprived during the period of illegal seizure.' " *Id.* at 782-783. The Seventh Circuit also affirmed the district court's

"timeliness" refusal to address the Accardis proportionality argument.

REASONS FOR GRANTING THE WRIT

I. A. THE PETITION SHOULD BE GRANTED BECAUSE THE REMEDY ADOPTED BY THE SEVENTH CIRCUIT COURT OF APPEALS FOR VIOLATION OF A PROPERTY OWNER'S DUE PROCESS RIGHTS AS GUARANTEED BY *UNITED STATES v. JAMES DANIEL GOOD REAL PROPERTY* IS WHOLLY INEFFECTIVE WHEN APPLIED TO NON-INCOME PRODUCING PROPERTY — IT NEITHER ENSURES THE PERSON'S RIGHT TO DUE PROCESS, NOR DETERS THE GOVERNMENT FROM UNLAWFUL *EX PARTE* SEIZURES.

The Court in *United States v. James Daniel Good Real Property, et al.*, 510 U.S. 43, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993) held only in exigent circumstances could the government in a civil forfeiture action seize real property without according the owner pre-seizure notice and a hearing. In the instant case, the Seventh Circuit Court of Appeals, though recognizing the Government's lengthy violation of the owners' due process rights, limited Petitioners' remedy to the "profits" they lost during the government's illegal seizure. 190 F.3d 781 at 782-83.

For owners of non-income producing real property, the lower court's holding is *per se* useless and ineffective. According to the lower court, if there is no profit there is no loss, and if there is no loss there is no remedy. The lower court's remedy for the government's violation of the Petitioners' due process rights makes this Court's declaration in *Good* dead-letter law. This is so because the due process

rights declared in *Good* are only enforceable if the owner stands to hold the government accountable for lost profits. For the petitioners who neither rented nor derived a profit from the land the *Good* decision might well not have been rendered.

The remedy for constitutional violations must provide an effective measure of redress. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). The Court should, in the absence of a Congressionally mandated remedy, consider a remedy that fully and efficiently guarantees the plaintiff's constitutional rights. *Schweicker v. Chilicky*, 487 U.S. 412, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988); *Bush v. Lucas*, 462 U.S. 367, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983). Further, in civil forfeiture actions, in particular, the government cannot be left with the unilateral power to control an owner's property in a manner that frustrates his or her right to redress. *See Republic National Bank of Miami v. United States*, 506 U.S. 80, 121 L. Ed. 2d 474, 113 S. Ct. 554 (1992).

The Court of Appeals for the Seventh Circuit's remedy as applied to non-income producing real property provides no measure of redress and leaves the Government free to illegally seize an owner's property with no fear of a clear deterrent remedy. There is little argument that needs to be said as to the remedial effect of a "lost" profit remedy when applied to non-incoming producing property. Offering the owner of non-income producing property the remedy of "lost profits" predictably provides the owner with nothing. Thus, despite the broad-based promise of *Good*, the lower court's chosen remedy limits its consideration only to the owners of income producing property.

Further, the Court of Appeals for the Seventh Circuit's remedy poses no deterrence to further illegal government seizures. If a remedy for illegal seizures exists only when the property results in lost profits then the government stands nothing to fear from the illegal seizure of non-income producing property. This situation permits the government to determine whether the financial circumstances of a case permit it to select when it needs to comply with the owner's due process rights. In effect, the government is left with the power to determine whether its economic exposure merits adherence to the Due Process Clause.

Still further, the government's lengthy illegal period of possession ousted without reason all other governmental entities from their legitimate exercise of jurisdiction over the property. Based upon its *ex parte* order the government controlled the property to the exclusion of all others. Consider that in this case divorce proceedings were contemplated and filed sometime after the farm was seized. Given this seizure, neither of the Accardis nor any judge addressing property issues in the divorce matter, could take any action whatsoever regarding the farm. Mrs. Accardi, for example, could not obtain a court order in the divorce proceedings ordering Mr. Accardi to leave the property. Further, neither of the Accardis could ask the divorce judge to partition the property pending the outcome of the forfeiture action.

One last factor weighs against the desirability of the lower court's remedy. If courts proceed with forfeiture actions despite the *Good* violations, the courts inevitably sully themselves with the wrongdoing of other governmental officials. That, obviously, creates an unsavory alliance between the judiciary and illegal government conduct.

Not surprisingly, the present case perfectly demonstrates the flaws in the lower court's remedy. First, the Government here most assuredly has unclean hands. The Government learned of its own *Good* violation no later than mid 1993. Notwithstanding that fact, however, the Government did absolutely nothing to "redeem" itself or "cure" the due process defect in the ongoing action. The Government, for example, did not voluntarily dismiss this forfeiture action when it learned of the *Good* violation, and thereafter rely simply on its already filed *lis pendens* notice. (Remember that the Court itself in *Good* explicitly noted that in many instances *lis pendens* notice would provide the government will all of the protection that the government needed.)

Further, when the Government learned in mid-1993 of its due process violation in the present case it did not otherwise affirmatively ask the district court to allow it, somehow, to rectify its due process mistake. The Government, for example, did not at that time file a new forfeiture action, though clearly such a filing would at that time have been timely. Further, the Government did not at that time ask the court immediately to conduct a two party hearing regarding the already seized property, a two party hearing that would have potentially "cured" the due process violation. Rather, when it learned of its *Good* violation in this case, the government did nothing at all.

Second, it is clear in the present case the threat of a financial remedy — lost profits — is unlikely to deter governmental officials from future misconduct. If the government believes that a court in the future will use the lost profits remedy the government will face no effective deterrent when dealing with non-income property. This is particularly likely to be so in residential real property

situations like the present one where the residential property produces no income or rent.

B. THE CIRCUIT COURTS OF APPEALS ARE IN CONFLICT AS TO THE APPROPRIATE REMEDY FOR *GOOD* VIOLATION CASES.

What then of the actual cases. Here the circuits are split. Ruling in an early post-*Good* case, the Court of Appeals for the Eighth Circuit insisted the government accord the owner pre-seizure notice and a hearing. In *United States v. One Parcel of Real Property, Located at 9638 Chicago Heights, St. Louis, Missouri*, 27 F.2d 327 (8th Cir. 1994) the court dismissed the forfeiture procedure, but granted the United States leave to refile the proceedings if timely. This remedy fully ensures the owner's rights as guaranteed under *Good* and fully ensures the right of the government to protect its interest in the property through appropriate lis pendens notice or other pre-seizure remedies short of its *ex parte* seizure of the property.

Further, unlike the majority of courts noted below, the Court of Appeals for the Eighth Circuit's remedy avoids the need for potentially protracted evidentiary hearings on questions such as the extent of the owner's economic loss. This remedy puts to rest in a simple and timely manner the question of whether the owner's due process rights have been honored.

All of the other circuits that have addressed this issue have granted a Seventh Circuit-like remedy in post-*Good* violation cases. These courts have ruled that a wronged owner after an appropriate evidentiary hearing may obtain compensation for losses incurred during the period of the wrongful seizures. First Circuit, *United States v. One 1989 23 Ft. Wellness Motor Vessel*, 125 F.3d 842 (1st Cir. 1997);

Fourth Circuit, *United States v. Marsh*, 105 F.3d 927 (4th Cir. 1997); Sixth Circuit, *United States v. Real Property Located at 1184 Drycreek Road, Granville, Ohio 43023*, 174 F.3d 720 (6th Cir. 1999); *United States v. All Assets and Equipment of West Side Building Corp.*, 58 F.3d 1181 (7th Cir. 1995); Ninth Circuit, *United States v. Real Property Located at 20832 Big Rock Drive, Malibu, CA.*, 51 F.3d 1406 (9th Cir. 1995); Tenth Circuit, *United States v. 51 Pieces of Real Property Rosewell, New Mexico*, 17 F.3d 1306 (10th Cir. 1994); Eleventh Circuit, *United States v. 408 Peyton Road, S.W. Atlanta, Fulton Cty., Georgia*, 162 F.3d 644 (11th Cir. 1998).

Though a numerical majority, the circuits that limit an owner to lost rents and profits plainly ignore the rights of non-income producing property owners. In refusing to consider the simplicity and efficiency of the Eighth Circuit's approach, the majority exposes property owners, such as the Accardis, to seizures without due process and signals to the government that violations will be tolerated if no economic loss is manifest. The legacy of *Good* should not be subverted by the recognition of a judicial remedy that mocks the violation of constitutional rights and tacitly implicates the judiciary in the wrongdoing of other government officials.

II. IF A "DAMAGES" REMEDY IS APPROPRIATE IN *GOOD* VIOLATION CASES, THE REMEDY SHOULD PERMIT RECOVERY OF PROVABLE NON-ECONOMIC LOSSES?

Though as noted above, the Eight Circuit has adopted an efficient remedy, all of the other circuits that have ruled on the *Good* violation remedies issue have ruled the remedy in these cases is nothing more than compensation for losses

incurred as a result of the wrongful seizure. Further, and more importantly, these other circuits have all ruled, albeit indirectly, that the compensable losses in this context are "economic" or "tangible" losses.

At least at first glance, the "economic compensation" remedies rulings of the various circuits make sense. They make sense, in turn, because in many *Good* cases the owners of the seized property have nothing more than an economic relationship with the seized property. Losses caused by a wrongful seizure, therefore, are in these cases nothing more than economic losses. In *Good*, for example, the owner of seized residential property was leasing that property to others. Hence, the only "injury" sustained by the owner in *Good* was economic. Likewise, in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 40 L. Ed. 2d 452, 94 S. Ct. 2080 (1974) the owner of a seized yacht was leasing the yacht to another. Again, therefore, the only "injury" sustained by the owner in this case was economic.

However, the post-*Good* cases that rely upon a damage award fail to consider situations in which the property owner sustains non-economic losses. Should not the owner be allowed to recover for injuries involving this intangible and non-economic?

Consider the present case. On May 7, 1996, the district court here stated that the only arguable injury would be the payment of expenses that would not have been borne if the building had remained occupied by the claimants. Hence, by definition, the district court here excluded from consideration any evidence that the Accardis might have submitted about injuries to the intangible relationship that might have existed between them and their farm. Despite

the potential dislocation and emotional distress caused by the seizure, the district court and Court of Appeals left no room for the Petitioners' to seek recovery unless they sustained an economic loss.

Further, as noted above, consider the fact that in this case divorce proceedings were contemplated and filed sometime after the farm was seized. Given this seizure, neither of the Accardis nor any judge addressing property issues in the divorce matter, could take any action whatsoever regarding the farm. Mrs. Accardi, for example, could not obtain a court order in the divorce proceedings ordering Mr. Accardi to leave the property. Further, neither of the Accardis could ask the divorce judge to partition the property pending the outcome of the forfeiture action.

The case law regarding recovery for non-economic and intangible injury following the deprivation of constitutional rights is clear. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), the Court explicitly noted that individuals subject to a deprivation of constitutional rights could obtain recovery for intangible, non-economic injuries, injuries such as emotional and mental distress. Similarly, the Court in *Carey v. Piphus*, 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978) indicated that damages for provable non-economic and intangible injuries could be awarded for constitutional torts.

III. THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT, REGARDING THE PROCEDURE FOR RAISING AN EIGHTH AMENDMENT PROPORTIONALITY DEFENSE, IS IN CONFLICT WITH THE RULING OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT.

The Petition should be granted because the Court of Appeals for the Seventh Circuit has ruled in the instant case that the proportionality issue must be raised in defense of the government's motion for summary judgment. This decision is in conflict with the ruling established by the Court of Appeals for the Third Circuit on the same issue.

In the instant case, the district court entered an order granting the Government's motion for summary judgment and forfeiting the Petitioners' interest in their residential farm property. The district court subsequently denied the Petitioners' motion for a proportionality hearing, ruling the Petitioners waived the proportionality issue by not presenting it as a defense in response to the government's summary judgment motion. Several months later the district court granted the Government's motion for a final decree and judgment of forfeiture. The court of appeals upheld the district court's ruling that the Petitioners should have raised the proportionality issue in defense of the Government's motion for summary judgment. The court of appeals rejected the petitioners' argument that a bifurcated hearing on the issue of an Eighth Amendment violation was the proper procedure to be applied in this case.

Unlike the Seventh Circuit, the Court of Appeals for the Third Circuit has adopted a bifurcated hearing procedure when Eighth Amendment violations are raised in a forfeiture case. In *United States v. Premises Known as RR #1, Box 224, Dalton, Scott Township*, the Court of Appeals for the Third Circuit ruled the requisite nexus of the defendant property to the illegal act must first be established. *United States v. Premises Known as RR #1, Box 224, Dalton, Scott Township*, 14 F.3d 864 (3d Cir. 1994). Once established the district court could then determine in a proportionality hearing whether in the seizure was in violation of the Eighth Amendment. Thus, the Third Circuit establishes a bifurcated hearing when the issue of proportionality is raised. This decision is clearly in conflict with the Seventh Circuit's which demands the proportionality hearing be combined with the hearing as to the underlying complaint for forfeiture.

In addition to being in conflict with the Third Circuit, the decision of the Seventh Circuit places the property owner in a Catch-22 situation. The effect of the Seventh Circuit's decision is to require the owner to raise the issue of proportionality at the same time as the issue of whether the defendant property was involved in illegal activity is before the court. The consequence of the lower court's decision is that the owner is required to assert two potentially inconsistent and self-defeating positions -- on the one hand, that the property is wholly innocent, but on the other hand, that the individual owner is divorced from the property's guilt. Any owner asserting the innocence of the defendant property in response to allegations of illegal activity involving the defendant property would sensibly argue that none of the defendant property should be forfeited. For an owner, any argument in opposition to a motion for summary judgment other than opposing the forfeiture of all the

property would potentially be an admission of the property's guilt. Thus, the lower court's decision, and rejection of the Third Circuit's bifurcation procedure, implicitly threatens the owner's legitimate interest in asserting Eighth Amendment proportionality rights by requiring that they be raised contemporaneously with the Fifth Amendment due process defense of the property. This process serves no legitimate governmental interest. Further, it requires the owner to raise the proportionality issue prematurely.

In the instant case, the Petitioners filed their motion for proportionality only when the issue was ripe; that is, immediately following the district court's granting of the Government's motion for summary judgment. At that point, the issue of whether the property would be forfeited had been established. The issue then arose as to the appropriate amount of defendant property to be forfeited in light of the gravity of the defendant's offense. If the Petitioners had filed their proportionality motion prior to a determination as to whether the defendant property could be forfeited, then the motion would have been filed prematurely. Thus, the interests of judicial economy were served when, in this case, the owner filed the motion for hearing on the issue of proportionality only after the issue of forfeiture has been decided. Further evidence of the Petitioners' timeliness in filing their motion is that the motion was filed five months before the district court issued the forfeiture judgment. Thus, the claimants raised the issue of proportionality as soon as it became ripe; that is, as soon as the parties knew that the district court would enter an interlocutory order for forfeiture on the defendant property. In conclusion, the Court should grant the Petition and adopt the bifurcated hearing procedure as demonstrated by the Third Circuit's holding.

IV. THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION OF THE CIRCUIT COURT OF APPEAL, WHICH BARS A HEARING RAISING EIGHTH AMENDMENT VIOLATIONS BASED UPON PROCEDURAL GROUNDS, CONFLICTS WITH THE SUPREME COURT'S DECISION IN *BAJAKAJIAN.*

The Petition should be granted because the decision of the court of appeals which denied the owner' motion for a proportionality hearing on procedural grounds conflicts with the Supreme Court's ruling in *United States v. Bajakajian* that a nexus must exist between the property seized and the illegal act in order for the seizure to conform to Eighth Amendment safeguards. *United States v. Bajakajian*, 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998).

The court of appeals affirmed the dismissal of the petitioners' motion for a proportionality hearing based on the finding that the motion was improperly raised pursuant to Rule 59 of the Federal Rules of Civil Procedure. Rule 59(e) of the Federal Rules of Civil Procedure allows for a party to file a motion to alter or amend a judgment provided that the motion is not substantive and is filed no later than 10 days after entry of the judgment. In the instant case, on April 28, 1997 the district court granted the Government's motion for summary judgment. On May 9, 1997, the claimants filed a motion for a proportionality hearing pursuant to the Eighth Amendment. The Petitioners' motion was filed five months before the district court issued the forfeiture decree on October 16, 1997. The lower court upheld the district court's ruling that the Petitioners' motion impermissibly raised substantive arguments not permissible under Rule 59(e), and that petitioners should have raised the issue of proportionality as a defense to summary judgment.

The district court's summary dismissal of Petitioners' motions for a proportionality hearing conflicts with the Eighth Amendment safeguards as outlined by this Court. The Court has ruled that when reviewing a proportionality issue the courts "must compare the amount of the forfeiture to the gravity of the defendant's offense. If the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional." *Bajakajian* S. Ct. at 2037.

In the instant case, the district court failed to find that the seizure was not in violation of the Eighth Amendment. Given the facts of this case, a proportionality hearing should not have been dismissed on procedural grounds. In the instant case, neither owner was convicted of any criminal violation in connection with this seizure. Additionally, the seizure netted only 45 marijuana plants on petitioners' property. The district court entered an order to allow the forfeiture of the family farm without making any factual findings as to the nexus between the illegal activity and the defendant property. It failed to take into account a series of relevant factors. Specifically, the district court failed to make any factual findings regarding the following relevant factors: the location of the marijuana plants, the size of the farm, whether any plants were harvested on the farm, whether the farm buildings were used to process the plants, whether the plant products were consumed on the farm, whether the farm was used to effect the sale of the plant products, and the individual owner's involvement in these activities.

The district court has an absolute duty to determine proportionality because the statute, 21 U.S.C. § 881, permits the seizure of all the defendant property only when that statute is violated. Absent a studied evaluation of all relevant

factors the district court could not make the required determinations called for by the Court's holding in *Bajakajian*. Thus, the Court of Appeals' affirmance of the district court's failure to make any finding as to proportionality conflicts with the Court's ruling in *Bajakajian* which identifies the likelihood of an Eighth Amendment violation as an element of a civil forfeiture. In conclusion, the Court of Appeals' decision misapprehends the Court's mandate that district court's make appropriate findings on proportionality prior to entering a final judgment of forfeiture.

CONCLUSION

Wherefore, because the remedy adopted by the Seventh Circuit for post-*Good* violations is inconsistent with the Court's announced guarantees of procedural due process, and because the procedural means adopted by the Seventh Circuit deny property owners the right to an effective hearing on the question of proportionality in civil forfeiture cases, the Petition for a Writ of Certiorari should be granted. In the alternative, the Petitioners pray for the Court to exercise its supervisory power over federal courts and reverse the decision of the Circuit Court of Appeals remanding the case with instructions to comply with the prior decisions of this Court.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED AUGUST 19, 1999

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 97-4145

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

47 WEST 644 ROUTE 38, MAPLE PARK, ILLINOIS,

Defendant,

GREGORY ACCARDI and HOLLY ACCARDI,

Claimants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 7906 — **Milton I. Shadur**, *Judge.*

ARGUED MAY 13, 1999 — DECIDED AUGUST 19, 1999

Before BAUER, MANION, and KANNE, *Circuit Judges.*

BAUER, *Circuit Judge.* Claimants Gregory and Holly Accardi bring this appeal to challenge the forfeiture of

47 West 644 Route 38, Maple Park, Illinois (hereinafter the "Property"). The Accardis argue that the district court should have dismissed the forfeiture action because the government's seizure of the Property violated the due process principles announced in *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993). They also argue that the forfeiture constituted disproportionate punishment in violation of the Eighth Amendment. We affirm.

I. Background

On September 13, 1992, Illinois State Police conducting aerial surveillance observed and photographed marijuana plants growing around the Accardis' barn and house. On September 15, several members of the Illinois State Police Task Force searched the Accardis' property. The search revealed marijuana plants growing next to a broken shed, in a locked barn, and near the property fence. In all, police found 45 growing marijuana plants, and over 500 grams of dried marijuana. Police also found several guns in the house.

On December 3, 1992, the U.S. Attorney's office began forfeiture proceedings pursuant to 21 U.S.C. § 881(a)(7). On December 9, the district court granted the government's *ex parte* motion for a warrant to seize the Property. The following year, the Supreme Court decided *Good*, which held that due process requires that the government provide an adversarial hearing before seizing real property that is subject to forfeiture. On May 6, 1996, the Accardis filed a motion to dismiss, arguing that the Property had been seized in violation of *Good*. The district court denied the motion, citing this Court's decision in *United States v. All Assets and Equip.*

of West Side Bldg. Corp., 58 F.3d 1181 (7th Cir. 1995), for the proposition that dismissal is not the proper remedy for a violation of *Good*. On April 28, 1997, the district court entered a memorandum opinion and order granting summary judgment in favor of the government in the forfeiture proceedings.

On May 9, 1997, the Accardis filed a motion to set a date for an Eighth Amendment proportionality hearing. The district court denied the motion on the grounds that the Accardis had waived the issue by failing to raise it in response to the government's motion for summary judgment. On October 16, 1997, the court issued a final decree of forfeiture. This appeal followed.

II. Discussion

A. Remedy for *Good* Violation

In *Good*, the Supreme Court held that "[u]nless exigent circumstances are present, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture." *Good*, 510 U.S. at 62. This principle applies to all cases, like this one, that were not final on the date that *Good* was decided. *All Assets*, 58 F.3d at 1191. Nonetheless, the district court denied the Accardis' motion to dismiss, holding that dismissal is not the correct remedy for a *Good* violation. We review *de novo*.

Good does not address the appropriate remedy for failure to provide a pre-seizure hearing. However, in *All Assets*, we

held that an "illegal seizure does not, standing alone, require that the property be immune from forfeiture." *All Assets*, 58 F.3d at 1193. Instead, the government is responsible "for the profits of which the claimant was deprived during the period of illegal seizure." *Id.* We recently reaffirmed this principle in *United States v. 8136 S. Dobson St., Chicago, Illinois*, 125 F.3d 1076, 1089 (7th Cir. 1997), and we affirm it again today. The district court's denial of the motion to dismiss was not error.

B. Proportionality Under the Eighth Amendment

The Accardis next argue that the forfeiture of their family farm was a disproportionate punishment in violation of the Excessive Fines Clause of the Eighth Amendment. *See Austin v. United States*, 509 U.S. 602 (1993); *United States v. Bajakajian*, 524 U.S. 321 (1998). This issue was not reached below because the district court held that the Accardis had waived their proportionality claim by failing to raise it in response to the government's motion for summary judgment. Although the Accardis deny it, their motion for a proportionality hearing constituted a motion for reconsideration under Federal Rule of Civil Procedure 59(e). All "substantive motions served within 10 days of the entry of judgment will be treated as based on Rule 59." *United States v. Deutsch*, 981 F.2d 299, 301 (7th Cir. 1992) (internal quotation marks and citation omitted). A substantive motion is one "that if granted would result in a substantive alteration in the judgment rather than just in a correction of a clerical error or in a purely procedural order such as one granting an extension of time within which to file something." *Britton v. Swift Transp. Co., Inc.*, 127 F.3d 616, 618 (7th Cir. 1997)

(internal quotation marks and citation omitted). Under this definition, the Accardis' motion was clearly a substantive one. Furthermore, although the Accardis' motion was technically filed eleven days after summary judgment was entered, the motion falls within the ten day limit because we exclude Saturdays and Sundays when the prescribed time period is less than eleven days.[1] *See* Fed. R. Civ. P. 6(a); *Popovits v. Circuit City Stores, Inc.*, 1999 WL 499487 at *2 (July 15, 1999). We review a district court's denial of a Rule 59 motion for abuse of discretion. *See Britton*, 127 F.3d at 619.

A party may not introduce evidence or make arguments in a Rule 59 motion that could or should have been presented to the court prior to judgment. *See Popovits*, 1999 WL 499487 at *2; *LB Credit Corp. v. Resolution Trust Corp.*, 49 F.3d 1263, 1267 (7th Cir. 1995). To get around this rule, the Accardis urge us to view the forfeiture process as a "bifurcated" one in which the court must first decide whether a property has been forfeited and then consider whether the forfeiture violates the Eighth Amendment. The Accardis cite no authority for this admittedly "novel" proposition, and we can think of nothing to recommend the procedure.

The Accardis next argue that proportionality is a factual matter that is not appropriately considered on summary judgment. However, this argument ignores the purpose of

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1. If the motion had fallen outside the ten day period, it would have been a motion for reconsideration under Rule 60. *See Deutsch*, 981 F.2d at 301 ("[S]ubstantive motions to alter or amend a judgment served more than ten days after the entry of judgment are to be evaluated under Rule 60(b).").

summary judgment, which is to decide cases in which there is no "genuine issue as to any material fact." *See* Fed. R. Civ. P. 56(c). All potential areas of factual dispute must be brought to the attention of the district court so that the court can determine whether summary judgment is appropriate. If the Accardis believed that there was a genuine issue of fact with respect to the proportionality of the forfeiture then they should have argued that summary judgment was inappropriate for that reason. Since the proportionality argument could (and should) have been raised prior to judgment, the district court did not abuse its discretion when it declined to address the argument after it had granted summary judgment.

CONCLUSION

Because damages are the appropriate remedy for a violation of *Good*, and because the Accardis raised their Eighth Amendment proportionality claims too late, we AFFIRM the district court's judgment in all respects.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

JUDGMENT — WITH ORAL ARGUMENT

Date: August 19, 1999

BEFORE: Honorable WILLIAM J. BAUER, Circuit Judge

Honorable DANIEL A. MANION, Circuit Judge

Honorable MICHAEL S. KANNE, Circuit Judge

97-4145

UNITED STATES OF AMERICA,

Plaintiff – Appellee

v.

47 W. 644 ROUTE 38, MAPLE PARK, ILLINOIS, 3,828 GOLD AND SILVER COINS OF UNKNOWN VALUE, and $1,336.00 IN U.S. CURRENCY,

Defendants

APPEAL OF: GREGORY ACCARDI
and HOLLY ACCARDI

Claimants

Appendix A

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 92 C 7906, Milton I. Shadur, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED APRIL 25, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 92 C 7906

UNITED STATES OF AMERICA,

Plaintiff,

v.

47 WEST 644 ROUTE 38, MAPLE PARK, ILLINOIS, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

This 21 U.S.C. §§ 881(a)(6) and 881(a)(7)[1] action seeks the forfeiture of 3,828 gold and silver coins ("Coins"), $1,336 in United States currency ("Funds") and real property at 47 West 633, Route 38, Maple Park, Illinois ("Property"). Each of Greg Accardi ("Greg") and Holly Accardi ("Holly") — collectively "Accardis" — has filed an individual claim of ownership of all of that property and contests such forfeiture.

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1. Further citations to Title 21 provisions will simply take the form "Section __."

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Now the United States has moved for summary judgment pursuant to Fed. R. Civ. P. ("Rule") 56. Both sides have complied (at least nominally) with this District Court's General Rule ("GR") 12(M) and 12(N),[2] and the United States' motion is fully briefed and ready for decision. For the reasons stated in this opinion, the motion is granted in part and denied in part.

Summary Judgment Standard

Under familiar Rule 56 principles, a party seeking summary judgment bears the burden of establishing the lack of a genuine issue of material fact (*Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)). This Court is called upon to draw inferences in the light most favorable to the non-moving party, but it is "not required to draw every conceivable inference from the record — only those inferences that are reasonable" (*Bank Leumi Le-Israel, B.M. v. Lee*, 928 F.2d 232, 236 (7th Cir. 1991)).

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2. GR 12(M) and (N) were designed to facilitate summary judgment motions by flushing out any factual disputes. Unfortunately Accardis' GR 12(N) statement does not follow that GR requirement that the nonmovant respond to "each numbered paragraph in the moving party's statement" — instead Accardis simply recite their own version of the facts. Under strict adherence to GR 12(N) that irregularity could be treated as Accardis' admission of all of the United States' GR 12(M) statements. But because this Court has discretion to determine what constitutes compliance with GR 12(N) (*McGann v. Northeast Ill. Reg'l Commuter R.R.*, 8 F.3d 1174, 1178 n.3 (7th Cir. 1993)), Accardis will be deemed to have admitted only those statements that they have not controverted (with factual support) in their GR 12(N) response.

Appendix B

What follows in the *Background* section is a factual statement drawn from the parties' submissions, with any differences between them resolved in Accardis' favor. Facts that fit better into the substantive legal discussion will be set out later in this opinion.

Background

On the morning of September 13, 1992 Illinois State Police Sergeant James Griffith ("Griffith") flew over the Property and saw what he said "appeared to be several cannabis plants behind the residence" (U.S. 12(M) ¶¶1-2; A. 12(N) Ex. A at 7).[3] He was flying at approximately 90 miles per hour at an altitude of approximately 1,000 feet (A. 12(N) Ex. A at 7-8). Griffith photographed the Property's area in question and showed the developed photographs to the Illinois State Police Task Force (A. 12(N) Supp. ¶4; A. 12(N) Ex. B). Police analysis of the photographs revealed what "appeared to be several potted marijuana plants growing behind a pole barn located on the defendant property" (U.S. 12(M) ¶7).

On September 15, 1992, without obtaining either a search warrant or an arrest warrant, about five Illinois State Police Task Force officers approached the Property (A. Supp. 12(N) ¶¶6-7). William Powell ("Powell"), the officer in charge of

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3. GR 12(M) statements by the government will be cited "U.S. 12(M) ¶ __" and Accardis' additionally numbered GR 12(N) statements will be cited "A. 12(N) Supp. ¶ __." Unless otherwise noted, the cited statements have been either explicitly or implicitly admitted in the corresponding response. Those same "U.S." and "A." abbreviations will be employed for the parties' other filings.

the investigation, stated that they intended "to get a consent search to search that property" (A. 12(N) Ex. C at 78). Whether the police legitimately obtained that consent is disputed by the parties. For purposes of this Rule 56 motion, however, this Court must credit the nonmovants' version of the facts: that the police fraudulently told Greg that they had a search warrant (A. 12(N) Ex. H at 36, 38), that Greg did not give consent for the search (*id.* at 47) and that his signature on the consent form is a forgery (A. 12(N) Exs. E at 6, F, G).

During their complete search of the premises on September 15 the police found a variety of items: 45 marijuana plants, 500 grams (about 17.6 ounces) of dried marijuana, 22 firearms with ammunition, $1336. in United States currency, some 3,828 gold and silver coins, electric drying fans, plant food, an Ohaus scale, two large electric grow lights and marijuana seeds (U.S. 12(M) ¶¶12-13). Greg was then arrested and charged with felony possession of marijuana,[4] and Holly was later charged with misdemeanor possession of marijuana (U.S. 12(M) ¶¶14-16). At trial in the state Circuit Court, Accardis moved to quash the arrest and suppress all the evidence seized during the September 15 search and seizure, which they argued violated their Fourth Amendment rights (U.S. 12(M) ¶19). That motion

4. Greg was also charged with a violation of Illinois state gun laws (U.S. 12(M) ¶15), but it seems likely that the charge did not proceed to trial because there is no mention of it either in the Illinois Appellate Court's opinion (*People v. Accardi*, 284 Ill.App.3d 31, 32, 671 N.E.2d 373, 373-74 (2d Dist. 1996)) or in Accardis' respónses to interrogatories about their criminal histories (Holly Dep. Ex. 4 ¶2; Greg Dep. Ex. 4 ¶2).

was denied based on the open fields doctrine of *Florida v. Riley*, 488 U.S. 445 (1989) (to which denial the Accardis preserved an objection). After a stipulated bench trial both Accardis were convicted (U.S. 12(M) ¶¶20-21).

Accardis appealed their convictions on the grounds that their motion to suppress should have been granted. Finding that the Circuit Court's reliance on *Riley* was misplaced, the Illinois Appellate Court (see n.4 for the citation to its opinion) reversed the convictions and remanded the case to the Circuit Court for a finding of whether the warrantless search and seizure had violated Accardis' Fourth Amendment rights. On remand the Circuit Court granted Accardis' motion to quash the arrest and to suppress evidence, based on a finding that the search "was an unconstitutional and warrantless intrusion onto the Accardi property" (*People v. Accardi*, Nos. 92 CF 1570, 92 CF 1838 (Ill. Cir. Ct., 16th Cir., Mar. 14, 1997).

To return to this action, on December 3, 1992 the United States filed its verified Complaint seeking forfeiture of the assets identified in the properties (U.S. 12(M) ¶17). Greg and Holly, (and another couple, the Stouts, whose claims are not implicated in the current motion) filed timely verified claims to the assets (*id.* ¶18). This Court granted several stays of this action during the pendency of the state court criminal proceedings, but the parties have now participated in discovery that serves as part of the predicate for the United States' Rule 56 motion and Accardis' response.

Appendix B

Standing Issues

Two types of standing are relevant in a civil forfeiture action: Article III standing and statutory standing (*United States v. $103,387.27*, 863 F.2d 555, 560 n.10 (7th Cir. 1988) (citations omitted)):

> To contest a forfeiture, a claimant first must demonstrate a sufficient interest in the property to give him Article III standing, otherwise there is no "case or controversy." With respect to statutory standing, once the procedural rules of [Fed. R. Civ. P., Supp. Rule C(6)] are met, a claimant has standing to defend the forfeiture.

Now at issue is whether either Accardi has Article III standing as to some of the property under consideration. As the United States says, by definition that is a threshold matter, for "unless [claimants] have Article III standing, federal courts lack jurisdiction to consider their claims, including their claim that the government did not have the requisite probable cause to seize the defendant property" (*United States v. $38,000*, 816 F.2d 1538, 1543 (11th Cir. 1987) (footnotes omitted)).

To establish Article III standing, Accardis bear the burden of establishing "a legally cognizable interest in the property that will be injured if the property is forfeited to the government" (*id.* at 1543 n.12). It is not necessary that a claimant's interest be one of ownership, for possession may suffice to establish standing (*United States v. Contents of Accounts Nos. 3034504504 and 144-07143*, 971 F.2d 974, 985 (3d Cir. 1992)):

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> Courts generally do not deny standing to a claimant who is either the colorable owner of the *res* or who has any colorable possessory interest in it. . . . An owner or possessor of property that has been seized necessarily suffers an injury that can be redressed, at least in part, by return of the seized property.

But "a naked claim of possession . . . is not enough" (*Mercado v. United States Customs Serv.*, 873 F.2d 641, 645 (2d Cir. 1989)). Instead (*id.*):

> There must be some indication that the claimant is in fact a possessor, not a simple, perhaps unknowing custodian, some indicia of reliability or substance to reduce the likelihood of a false or frivolous claim.

Greg's Standing as to the Coins

U.S. Mem. 3 challenges Greg's Article III standing to claim the Coins. At his Dep. 15 Greg disclaimed any direct interest in that property, stating "I am not the owner of the coins" and "I believe they belong to Steve and Sue [Stout] and Holly." Both Holly and her brother Steve Stout ("Steve") concur that Greg was not the Coins' owner (Holly Dep. 14-15, Steve Dep. 16). Greg instead characterized his claim on the Coins as "through marital" (Greg Dep. 17), and A. Mem. 2 cites to the Illinois Marriage and Dissolution of Marriage Act (the "Act," 750 ILCS § 5/503(c)(1)) for that proposition. But the Act does not save Greg's claim because, as explained in *Kujawinski v. Kujawinski*, 71 Ill.2d 563, 573, 376 N.E.2d 1382, 1386 (1978):

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> The Act does not purport to affect property interests during the marriage. The term "marital property" is a nomenclature devised to realize an equitable distribution of property upon termination of the marriage. Operation of the term "marital property" under the Act is not triggered until the time of dissolution.

By his own admission, then, Greg does not have any ownership or possessory interest that would suffice for him to lay claim to the Coins. Accordingly the United States is entitled to a judgment as a matter of law on that standing issue, and Greg's claim to the Coins is dismissed.

Holly's Standing as to the Funds

In addition the United States challenges Holly's standing to claim the Funds. Holly Dep. 15 said that she based her claim to the Funds on the fact that they were taken from her property, but she also admitted that the money was not hers and that she did not know to whom it belonged. Merely claiming an ownership interest in premises from which property is seized is not sufficient to establish standing in civil forfeiture actions (*United States v. $501,958*, 633 F. Supp. 1300, 1301-02 (N.D. Ill. 1986) and cases cited there). Accardis' argument that Holly may claim the Funds as marital property under the Act fails for the same reason that Greg struck out as to the Coins. As a matter of law Holly has not shown the requisite standing to claim the Funds, and her claim to them is dismissed.

Appendix B

Fourth Amendment Claim

To succeed on the current motion the United States bears the initial burden of showing that it has probable cause to believe that the property at issue is subject to forfeiture (*United States v. All Assets & Equipment of West Side Bldg. Corp.*, 58 F.3d 1181, 1188 (7th Cir. 1995)). That opinion (*id.*, quoting *United States v. $94,000*, 2 F.3d 778, 782-83 (7th Cir. 1993), with other citations and footnotes omitted) has described the burden in these terms:

> To show probable cause the government must demonstrate that it has "reasonable ground for the belief of guilt supported by less than *prima facie* proof but more than mere suspicion." In this showing, the government may rely not only on direct evidence but also on circumstantial evidence and on hearsay evidence.[5] Probable cause for the forfeiture exists if the government demonstrates a nexus between the seized property and illegal narcotics activity.

At the summary judgment stage on the ultimate issue of forfeiture, probable cause for that result (not probable cause for the original seizure of property) is determined as of the time of the ultimate forfeiture determination (that is, right now), not as of the time of seizure (*United States v. Two*

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5. [Footnote by this Court] Accardis mistakenly rely on a misreading of the statute when they suggest (A. Mem. 5-7) that hearsay evidence is not admissible to show probable cause. *All Assets* clearly teaches that such evidence may indeed be considered to find probable cause in a forfeiture action.

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Parcels of Real Property, 92 F.3d 1123, 1127-28 (11th Cir. 1996) (per curiam) and cases cited there).

But before this Court turns to the question of whether there is indeed such probable cause to warrant forfeiture, it must undertake a preliminary inquiry as to whether there is a material issue of fact about the legality under the Fourth Amendment of the September 15 search and of the seizure of the Property. As established in *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 702 (1965), when evidence is seized in violation of a claimant's Fourth Amendment rights "the exclusionary rule is applicable to forfeiture proceedings." Thus illegally seized evidence would be excluded in this probable cause determination, just as would any other evidence that is "a fruit of the poisonous tree" (*Nardone v. United States*, 308 U.S. 338, 341 (1939)).

As an initial matter, Accardis have raised an issue of fact about whether the marijuana was growing within the area of curtilage linked to their home. As reflected in *California v. Ciraolo*, 476 U.S. 207, 212-13 (1986), curtilage is afforded the same protection as the home itself:

> The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened.

Here the police aerial photographs reveal that Accardis' house was closely surrounded by a cluster of buildings (A. 12(N) Ex. B) and that the marijuana was growing in and

around one of those buildings (U.S. 12(M) ¶¶7, 13). For purposes of this Rule 56 motion, then, it will be assumed that the marijuana and other evidence seized on September 15 was located within the curtilage and therefore should have been afforded the same treatment as if it were actually located in Accardis' residence.

It is well settled that the police flyover of the Property was not an improper search in violation of the Fourth Amendment. Property owners do not have a reasonable expectation of privacy in curtilage areas that are visible to the naked eye from public vantage points, including navigable airspace — the "public airways" (*Riley*, 488 U.S. at 450; *Ciraolo*, 476 U.S. at 213). And Accardis have not raised any of the concerns articulated in *Riley*, 488 U.S. at 451-52 about police who fly contrary to regulations or about interference with Accardis' use of their property. Indeed, the 1000-foot altitude flight by a fixed-wing aircraft in this case paralleled exactly the circumstances in *Ciraolo*, so that this case does not involve the added complexities of very low level helicopter flights that were dealt with in *Riley*.

Riley and *Ciraolo* do not of course mean that evidence discovered in the September 13 flyover is automatically subject to seizure, because in each of those cases the evidence seen in the flyover was used to establish probable cause to obtain a search warrant (*Riley*, 488 U.S. at 448-49; *Ciraolo*, 476 U.S. at 209) — a step that the police did not take here. Absent exigent circumstances, police may not search a person's home or curtilage without a search warrant (*McDonald v. United States*, 335 U.S. 451, 455-56 (1948)). As taught as long ago as *Agnello v. United States*, 269 U.S. 20, 33 (1925):

> Belief, however well founded, that an article sought is concealed in a dwelling house furnished no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause.

Here the United States has not identified any exigent circumstances present at the time of the September 15 entry on the Property to justify a warrantless search and seizure, relying instead on the claim that Greg consented to the search (U.S. Mem. 11). But there is a clear question of fact about the legitimacy of Greg's signature on the consent form, as evidenced by the testimony of a police handwriting analyst who concluded that the signature on the form was a forgery (A. 12(N) Ex. H at 47) and by Greg's testimony that the police lied to him about possessing a search warrant (*id.* at 36, 38).

Viewing those facts in the light most favorable to Accardis, a reasonable factfinder could conclude that the evidence was seized from the Property in violation of Accardis' Fourth Amendment rights. And it is certainly worth noting in that respect that an Illinois Circuit Court has recently addressed the selfsame question on the remand of Accardis' criminal convictions and has determined that the search of Accardis' property was unconstitutional. To be sure, this Court is not bound in issue preclusion terms by that finding,[6] but the result certainly buttresses the conclusion

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6. State criminal court evidentiary determinations do not control in later federal court proceedings because there is no privity (Cont'd)

that a reasonable trier of fact could conclude that the September 15 search and seizure violated the Fourth Amendment.

Scope of Suppression

In the absence of briefing by either party on the scope of evidence to be suppressed if this Court were to find a Fourth Amendment violation (see U.S. Mem. 11-12, A. Mem. 7-11), this opinion will not define the exact extent of any potential suppression. Instead it must address a slightly different question: If a Fourth Amendment violation were assumed to have occurred,[7] what evidence (if any) exists to

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(Cont'd)
of parties, given the fact that two different sovereigns are involved (*United States v. Lauchli*, 724 F.2d 1279, 1282 (7th Cir. 1984), citing *United States v. Panebianco*, 543 F.2d 447, 456 (2d Cir. 1976)). And as *Panebianco*, *id.* teaches:

> [C]ollateral estoppel never bars the United States from using evidence previously suppressed in a state proceeding in which the United States was not a party.

7. This Court knows of no determination or even dictum that it has voiced to that effect — yet A. Mem. 7 mysteriously says:

> [T]his Court has already ruled that no evidence concerning the search and seizure of the Accardi farm will be admissible or considered in this motion for summary judgment.

Accardis do not specify a date for that alleged ruling, and even apart from this Court's independent recollection, neither the court file
(Cont'd)

show probable cause for any forfeiture that would not be excluded *as a matter of law*?

As the seminal decision in *Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963) teaches:

> The exclusionary prohibition extends as well to the indirect as the direct products of such invasions.
>
> * * * *
>
> Thus, verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the "fruit" of official illegality than the more common tangible fruits of the unwarranted intrusion.

Wong Sun, *id.* at 485 quotes *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) as "express[ing] succinctly" the policy behind that rule:

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at

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(Cont'd)
nor the electronic docketing system reflects any order along those lines as having been entered. Because that statement was in error, it should be emphasized that the assumption here that evidence would be suppressed is only that — an assumption.

> all. Of course that does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed.

Under that principle it is clear that all the physical evidence seized from Accardis' residence on September 15 (and all police testimony about that evidence) would be suppressed as the direct product of the assumed illegal search. Just as clearly, testimony about the September 13 flyover and the resulting photographs would *not* be subject to exclusion because that evidence was gained independently before any arguably tainted search and seizure. Neither of those clear examples, however, directly controls evidence that is critical here: statements made by Greg before and during his criminal trial and by both Accardis during the discovery process in this action.

To determine whether such statements by Accardis would or would not be subject to suppression, the finder of fact must determine "whether the taint of an unlawful search or arrest has sufficiently dissipated so as to no longer taint a subsequently acquired statement" (*United States v. Patino*, 862 F.2d 128, 132 (7th Cir. 1988)). 5 Wayne LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* ("LaFave") §11.4(c), at 272 (3d ed. 1996) (quoting *Wong Sun*, 371 U.S. at 488, other footnotes omitted) puts it in these terms:

> In the typical case in which the defendant was present when incriminating evidence was found

> in an illegal search or in which the defendant was confronted by the police with incriminating evidence they had illegally seized, it is apparent that there has been an "exploitation of that illegality" when the police subsequently question the defendant about that evidence or the crime to which it relates.

United States v. Nafzger, 965 F.2d 213, 217 (7th Cir. 1992) (per curiam) is an example of such a direct link where a defendant admitted to police, immediately after police had conducted an illegal search and discovered a truck in his shed, that he knew the truck was a stolen vehicle. *Nafzger*, *id.* (citation omitted) held:

> The court also should have suppressed Nafzger's statements to the officers because it is clear that the evidence turned up by the illegal search — the truck — triggered Nafzger's subsequent admission that he know the truck was stolen. The admissions were a direct result of the illegal search.

But when the connection is more attenuated than that, our Court of Appeals applies the factors used in *Brown v. Illinois*, 422 U.S. 590 (1975) to determine when an illegal arrest taints later statements (*United States v. Fazio*, 914 F.2d 950, 957 (7th Cir. 1990); *Patino*, 862 F.2d at 132).[8] *Patino*, *id.* (citation to *Brown* omitted) summarizes those factors:

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8. *Patino* and *Fazio* represent a minority position in the application of the *Brown* factors to a statement following an illegal *search* as well as after an illegal *arrest* (see 5 LaFave §11.4(c), at 272-73). Of course this Court follows the lead set by our Court of Appeals.

Appendix B

> The threshold requirement in the attenuation analysis is the voluntariness of the challenged statement. As *Brown* makes clear, although this is an important factor, it is not dispositive. The remaining factors bearing on admissibility are the "temporal proximity" of the illegal conduct and the confession, the presence of any intervening circumstances, "and, particularly, the purpose and flagrancy of the official misconduct."

Here that line of analysis must be applied to a number of statements made by Accardis:[9]

> 1. Greg's signed statement made at the police station on September 15, a few hours after the police had searched the Property and arrested him (U.S. Ex. A);
>
> 2. Greg's testimony at his criminal trial that when the marijuana was discovered during the September 15 search, he admitted that the plants were his in exchange for the police agreeing to refrain from involving Greg's wife and son (A. 12(N) Ex. H at 43-44);

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9. It may be noted parenthetically that all of Accardis' statements were made voluntarily. Neither sought to exercise his or her Fifth Amendment rights at any time — though the principal reason that this case has become so ripe on the vine (a bad pun?) is that this Court had stayed all proceedings while Accardis' state criminal charges were still unresolved, thus sparing Accardis a possible Hobson's choice.

3. interrogatory responses by Greg and Holly that the marijuana plants were growing on their property for Greg's personal use (Holly Dep. Ex. 4 ¶17; Greg Dep. Ex. 4 ¶17), and their deposition testimony regarding those answers (Holly Dep. 25-26; Greg Dep. 20-23);

4. Holly's deposition testimony that both she and Greg had used marijuana on the property (Holly Dep. 27-30) and that she was divorcing Greg because of his drug problems (*id.* 6-10); and

5. deposition testimony and interrogatory answers by each of Greg and Holly as to the origin of the Coins seized on September 15 (Holly Dep. 13-18; Greg Dep. 15-18) and as to the origin of the Funds (Holly Dep. 19; Holly Dep. Ex. 4 ¶5; Greg Dep. Ex. 4 ¶5).

This opinion will address each of those statements in turn.

Greg's signed statement to the police on the day of the search and arrest could be found by a reasonable factfinder to be tainted under either the *Nafzger* "direct result" test or the *Brown* factors. As in *Nafzger*, the statement was made soon after the time of the search, where Greg had been present when the police uncovered the evidence about which Greg made incriminating statements. And under the *Brown* approach, although the voluntary nature of the statement may not be in question, the statement was made temporally close to the time of the illegal search and there were apparently no intervening factors such as a lawyer present (U.S. Ex. A;

A. 12(N) Ex. H at 47-52). Finally, the police conduct may be found by a factfinder to have been "flagrant," because there are factual issues about whether the police misrepresented to Greg that they had a search warrant when they encountered him in his home on September 15 (A. 12(N) Ex. H at 36, 38). Thus Greg's signed statement may not be considered for purposes of this motion.

Similarly, Greg's testimony about his statements to the police during their search of his property also could be considered tainted under either analysis. As with the signed statement, those oral statements were a direct result of the police discovering the potentially suppressed evidence. And under the *Brown* factors, not only is the temporal gap considerably shorter than that of the later signed statement but the voluntary nature of the earlier oral statement is also in question in light of Greg's testimony that the officer threatened to involve his family (*id.* 43-44). Accordingly that statement will also not be considered in determining probable cause for summary judgment purposes.

Accardis' interrogatory responses and deposition testimony about Greg growing marijuana for personal use call for a different result. It is true that as in *Nafzger* the United States' questions about the amount of marijuana found were directly triggered by the presumed illegally obtained evidence (Holly Dep. Ex. 3 ¶17; Greg Dep. Ex 3 ¶17). But on the other hand, most of the *Brown* factors are not present: (1) no record facts indicate that the statements were not voluntary; (2) nearly four years had passed between the possible illegal search and the interrogatory responses; and (3) an intervening factor was present in that the Accardis

were represented by a lawyer, who actually signed the interrogatory responses on Accardis' behalf (Holly Dep. Ex. 4 ¶17; Greg Dep. Ex. 4 ¶17). Even though the long-past flagrancy of the police conduct might still weigh in the scales a bit, on balance the congeries of *Brown* factors compels the conclusion that those statements by Accardis are sufficiently attenuated to purge the taint. This Court is constrained, under *Patino* and *Fazio*, to find that as a matter of law those statements would not be suppressed and may properly be considered for this motion.

Next, Holly's deposition testimony about Accardis' personal use of drugs, given in response to inquiries other than those that invoked the questionable evidence, will also be considered on the current motion. In addition to the same dearth of *Brown* factors linking those deposition statements directly to the September 15 seizure, the United States can look to an independent source for asking about Accardis' drug use — the September 13 flyover and photographs.

Finally, Accardis' interrogatory responses and deposition testimony with respect to the Coins and Funds present the same issue as their responses about the growth of marijuana for personal use — the United States' questions were directly triggered by the presumed tainted evidence, yet virtually none of the adverse *Brown* factors are present. And so for the same reasons as discussed earlier, Accardis' statements as to those seized items will also be considered on this motion.

Appendix B

Probable Cause

This opinion has earlier identified the applicable probable cause standard and the nature of the burden that it imposes on the United States in the first instance. Once the government has met that threshold burden, the claimant then has the ultimate burden to prove by a preponderance of the evidence that the property is not subject to forfeiture by showing that the property was not used in connection with drug activities (*All Assets*, 58 F.3d at 1189). Furthermore (*id.*):

> If the claimant fails to rebut the government's proof, that showing of probable cause alone will support a judgment of forfeiture.

This opinion will address the parties' relative burdens, first as to the forfeiture of the Property and then as to the forfeiture of the Coins and the Funds.

Property Forfeiture

United States seeks forfeiture of the Property under Section 881(a)(7), which subjects to such forfeiture any real property "which is used or intended to be used" to commit "a violation of this subchapter punishable by more than one year's imprisonment."[10] Included in the list of violations

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10. Both Section 881(a)(6) and Section 881(a)(7) contain exceptions for situations where the owner establishes that the act or omission was "committed or omitted without the knowledge or consent of that owner." Accardis have not sought to raise that "innocent owner" defense.

subject to more than one year's imprisonment is the "manufacture" of a controlled substance (Section 841(a)) — and despite the oddity of such an interpretation in terms of normal usage, the cultivation of marijuana constitutes "manufacturing" in violation of that section (see the Section 802(15) definition of "manufacture" and the Section 802(22) definition of "production" as including the "planting, cultivation, growing, or harvesting or a controlled substance." Thus *United States v. One Parcel of Real Property*, 960 F.2d 200, 205 (1st Cir. 1992) has squarely rejected the contention advanced by Accardis to challenge forfeiture of the Property on that basis.[11]

Several properly admissible factors establish probable cause to believe that the Property was used to grow marijuana. There is Griffith's testimony that he saw what "appeared to be several cannabis plants" growing on the Property during the September 13 flyover (A. 12(N) Ex. A at 7), confirmed by the photographs that he took (A. 12(N) Ex. B).[12] There are also Accardis' admissions that Greg was

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11. Accardis mistakenly base their objection to the United States' probable cause showing on the false premise that Section 881(a)(7) requires that the property be used for narcotics *trafficking* and is not triggered by merely growing a controlled substance for personal use (A. Mem. 9-11). But Congress is free to enact a different and broader vocabulary, and it has done so here.

12. U.S. R. Mem. 7-8 suggests that issue preclusion mandates a finding here that the photographs alone sufficiently establish probable cause because the Illinois Appellate Court "implicitly recognized" that the photographs indicated that marijuana was

(Cont'd)

growing the plants for his personal use (Holly Dep. Ex. 4 ¶17; Greg Dep. Ex. 4 ¶17). And there is Holly's testimony that Greg had a drug problem and that she had seen him smoking marijuana on the property (Holly Dep. 6-10, 27-30). In combination, those factors amply establish probable cause that the Property is subject to forfeiture, and Accardis have not raised anything to create a factual issue as to whether the Property was being used to grow marijuana. Accordingly the United States' motion for summary judgment regarding the Property is granted.[13]

(Cont'd)
growing on the Property. But issue preclusion does not operate when that issue was not necessary to support the judgment in the first action (18 Charles Wright, Arthur Miller & Mary Kay Kane, *Federal Practice and Procedure: Jurisdiction* §4421, at 192 & n.1 (1981)). In this instance it was unnecessary to assess the sufficiency of the photographs at the Illinois Appellate Court level, because even if probable cause *was* established the later warrantless search of the curtilage was still potentially illegal. Thus this opinion considers the photographs as suggestive, but not conclusive, of marijuana growth. And that combined with Accardis' admissions unquestionably equates to probable cause here.

13. Nothing has been developed in the record before this Court to enable any comparison between the amount of marijuana found on the Property and the value of the Property — the kind of comparison that could conceivably present a proportionality question under the Eighth Amendment's Excessive Fines Clause, which has been held applicable to civil forfeiture actions in *Austin v. United States*, 509 U.S. 602, 622 (1993). In any event, Accardis have not raised that defense, and it is surely not for this Court to raise and consider it sua sponte.

Appendix B

Coins and Funds Forfeiture

As for the potential forfeiture of the Coins and Funds, the United States looks to Section 881(a)(6), which targets money or "other things of value" furnished or intended to be furnished for illicit drug trafficking or "proceeds traceable to such an exchange." Accardis have successfully raised issues of fact to stave off summary judgment for both items.

With respect to the Coins, it has already been said that they are part of the physical evidence whose seizure is assumed to be suppressed for this motion. That being the case, the record is insufficient to establish probable cause that the Coins were the proceeds or intended to be used for a drug transaction. Even if the United States were able to establish probable cause, Holly has raised material factual issues to support the legitimacy of their origin. She and her brother Steve testified that their father collected coins and gave them to both Holly and Steve as a gift (Holly Dep. 13-18; Steve Dep. 15-18) and that they were given to Holly in the waterproof piping in which they were found (Holly Dep. 16; Steve Dep. 19). Accordingly a reasonable jury could find the Coins not subject to forfeiture.

With respect to the Funds, again no information surrounding where and how they were found may be considered for present purposes due to the possible Fourth Amendment violation. Additionally, Greg has raised an issue of fact about the origin of the Funds — he claims that they were wages from his 10-plus years of employment with the City of Chicago (Greg Dep. 18-19, Ex. 4 ¶13). Thus a reasonable jury could also find that the Funds do not qualify for forfeiture under Section 881(a)(6).

In sum, the United States' motion must be denied as to both the Coins and the Funds. If the United States persists in seeking their forfeiture, the factual issues will have to be resolved in an evidentiary proceeding.

Conclusion

Because there are no disputes of fact as to Greg's insufficient interest in the Coins or as to Holly's insufficient interest in the Funds to support their Article III standing to claim those assets, the United States is entitled to a judgment as a matter of law as to those standing issues. Accordingly, Greg's verified claim to the Coins and Holly's verified claim to the Funds are both dismissed.

Even under an assumed finding that Accardis' Fourth Amendment rights were violated so that evidence resulting from the search of the Property must be suppressed, the United States has shown that there is no dispute of fact that marijuana was being grown on the Property and that therefore the Property is, as a matter of law, subject to forfeiture. Consequently judgment is ordered to be entered in the United States' favor to that effect, and both Accardis' claims are dismissed to that extent. But material issues of fact remain regarding forfeiture of the Coins and Funds, so that the United States' motion for summary judgment is denied (1) against Holly as to the Coins and (2) against Greg as to the Funds.

Finally, a status hearing is set for May 13, 1997 at 9:00 a.m. Before that date counsel for the parties should confer as to a proposed form of judgment order to implement the

forfeiture of the Property under Section 881(a)(7), and that proposed judgment order form shall be delivered to this Court's chambers for its consideration not later than May 9, 1997. At the May 13 status hearing counsel should be prepared to discuss the future course of the remaining aspects of this action.[14]

s/ Milton I. Shadur
Milton I. Shadur
Senior U.S. District Judge

Date: April 25, 1997

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14. This case provides another graphic illustration of the outstanding contributions regularly provided by this Court's always-excellent law clerks — in this instance Andrea Axel, Esq. Without in any way denigrating the efforts of counsel for the parties (each of whom had some things right and other things wrong in their respective memoranda), the depth of analysis in this opinion owes a great deal to Ms. Axel's work. As always when this Court pays such well-deserved tributes to its clerks, it should be added — though not at all to detract from this tribute — that any flaws (either technical or substantive) that may be found to exist in this opinion are to be laid at the doorstep of this Court and *not* of Ms. Axel. This Court always conducts a painstaking word-by-word and sentence-by-sentence revision of its law clerks' drafts, and the ultimate product that bears this Court's signature is entirely its own.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED NOVEMBER 2, 1999

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

November 2, 1999

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. DANIEL A. MANION, *Circuit Judge*

Hon. MICHAEL S. KANNE, *Circuit Judge*

No. 97-4145

United States of America,

Plaintiff-Appellee,

v.

47 West 644 Route 38, Maple Park, Illinois,

Defendant.

Gregory Accardi and Holly Accardi,

Claimants-Appellants.

Appendix C

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 92 C 7906

Milton I. Shadur, *Judge*.

ORDER

Claimants-appellants have filed a petition for rehearing and petition for rehearing en banc. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX D — DECREE OF FORFEITURE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED OCTOBER 16, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 92 C 7906

JUDGE SHADUR

UNITED STATES OF AMERICA,

Plaintiff,

v.

47 WEST 644 ROUTE 38, MAPLE PARK, ILLINOIS;

3,828 GOLD AND SILVER COINS
OF UNKNOWN VALUE;

and

$1,336.00 in U.S. CURRENCY,

Defendants.

DECREE OF FORFEITURE

This matter coming before the court on the United States' motion for entry of a decree of forfeiture, due notice having

been given and the court being fully informed in the premises, finds as follows:

1. This *in rem* drug related forfeiture was commenced on December 3, 1992, by the filing of a verified complaint.

2. Process was duly served and notice was published by the United States Marshal as required by Rule C, Supplemental Rules for Certain Admiralty and Maritime Claims.

3. Greg Accardi, Holly Accardi, Steven Stout, Suzanne Stout, Regency Savings Bank, and the Kane County Treasurer have filed verified claims and answers.

4. No other parties have asserted claims or filed responsive pleadings to the complaint and the time to do so under the law has expired.

5. On April 28, 1997, the court entered a memorandum, opinion and order granting summary judgment against the claims of Greg and Holly Accardi ("Accardis") to the defendant real property, finding probable cause to believe that said real property had been used to illegally grow or facilitate the growth of marijuana, a controlled substance, and accordingly finding the Accardis' interest in the defendant real property subject to forfeiture to the United States.

Accordingly, it is hereby ORDERED, ADJUDGED AND DECREED:

Appendix D

1. That all persons other than Greg Accardi, Holly Accardi, Steven Stout, Suzanne Stout, Regency Savings Bank and the Kane County Treasurer are held in default.

2. The defendant real property, legally described as:

> That part of the East half of the Southwest quarter of Section 34, Township 40 North, Range 6 East of the Third Principal Meridian described as follows: Beginning at the intersection of the Northerly right of way line of Route 38, as originally dedicated, with the West line of the East half of said Southwest quarter; thence North along said West line 6 chains; thence East at right angles to said West line 10 chains; thence South parallel with the West line of the East half of said Southwest quarter 6 chains to the Northerly right of way line of Route 38, as originally dedicated; thence Westerly along said northerly line 10 chains to the point of beginning, (excepting therefrom that part conveyed to the People of the State of Illinois by Warranty deed recorded August 25, 1961 as document 957184), in the Township of Virgil, Kane County, Illinois.
>
> Permanent Index Number 07-34-300-006

which is commonly known as 47 West 644 Route 38, Maple Park, Illinois, is hereby condemned and forfeited to the UNITED STATES OF AMERICA, in accordance with the provisions of 21 U.S.C. § 881(a)(7). The property shall be disposed of by the United States Marshal's Service according to law.

3. Upon sale of the defendant property by the United States Marshals' Service, the net proceeds (after satisfaction of the Marshals' expenses) shall be distributed as follows:

(a) to claimant Regency Savings Bank, the amount due and owing, as documented by a payoff letter as of the date of closing;

(b) to the Treasurer of Kane County, any real estate taxes due and owing, as documented as of the date of closing;

(c) to Steve and Suzanne Stout, fifty percent (50%) of the net proceeds remaining.

(d) to the United States, fifty percent (50%) of the net proceeds remaining, which shall be forfeited to the United States and disposed of according to law.

5. Pursuant to agreement of the United States, the defendant property described as 3,828 gold and silver coins of unknown value and $1,336.00 in U.S. currency, is hereby dismissed.

6. The court will retain jurisdiction in this matter to implement and enforce the decree.

ENTER:

s/ Milton I. Shadur
UNITED STATES DISTRICT JUDGE

Dated: Oct. 16, 1997

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS DATED OCTOBER 16, 1997 AND DOCKETED OCTOBER 20, 1997

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate Judge SHADUR

* * *

Case Number 92 C 7906

Date THURSDAY, OCTOBER 16, 1997
@1:15 p.m.

Case Title UNITED STATES v. 47 W. 644 Route 38, et al.,

MOTION:

* * *

UNITED STATES' MOTION FOR ENTRY
OF DECREE OF FORFEITURE

DOCKET ENTRY:

(1) ☒ Filed motion of [use listing in "MOTION" box above]

* * *

(10) ☒ [Other docket entry] Motion granted. Enter Decree of Forfeiture. It is hereby Ordered, Adjudged and

Appendix E

Decreed: 1. That all persons other than Greg Accardi, Holly Accardi, Steven Stout, Suzanne Stout, Regency Savings Bank and the Kane County Treasurer are held in default. The defendant real property, which is commonly known as 47 West 644 Route 38, Maple Park, Illinois is hereby condemned and forfeited the the United States. Pursuant to agreement of the United States, the defendant property described as 3,828 gold and silver coins of unknown value and $1,336.00 in U.S. currency, is hereby dismissed.

(11) ☒ [For further detail see . . . ☒ order attached to the original minute order form.]

☒ No notices required, advised in open court.

* * *

OCT 20 1997 date docketed

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